88-2038

Supreme Court, U.S.
FILED
MAY 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1989

MELVIN ALLEN LIVERMAN, JR.,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

I. Woodrow Crook, Jr.
Attorney at Law
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Post Office Box 406
Smithfield, Virginia 23430
(804) 357-3050

QUESTION PRESENTED FOR REVIEW

Where the defendant invoked his right to have counsel present during custodial interrogation, was there a valid waiver of that right established and thus whether the use of his confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation.

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B. JUDGMENT APPEALED FROM THE SUPREME COURT OF VIRGINIA - ENTERED - FEBRUARY 21, 1989

C. MOTION RECORDED IN THE SUPREME COURT OF VIRGINIA DATED MARCH 1, 1989

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OPINIONS BELOW

The opinion of the Court of Appeals of Virginia is the only written opinion in this case and is included in the appendix hereto. The Supreme Court of Virginia simply denied the appeal and the order of the Supreme Court of Virginia is also enclosed herewith.

JURISDICTIONAL STATEMENT

This is an appeal from the decision of the Supreme Court of Virginia of February 21, 1989 which refused the petition for appeal of the Petitioner and order of the Supreme Court of Virginia of March 16, 1989 which denied the motion of the Petitioner which had been filed on or about March 1, 1989 wherein the petitioner informed the Supreme Court of Virginia that the Petitioner wished to appeal the decision to the Supreme Court of the United States upon the grounds of violation of the Constitutional rights of the Petitioner under the Fifth and Fourteenth

Amendment of the Constitution of the United States and because of the indigence of the Petitioner, the Petitioner requested the Supreme Court of Virginia to appoint able and competent counsel to assist him in perfecting his appeal and which further recited that H. Woodrow Crook, Jr., counsel appointed by the Circuit Court for the City of Suffolk, to assist the Petitioner in perfecting his appeal to the Court of Appeals and to the Supreme Court of Virginia is not qualified in the Supreme Court of the United States and thus not competent to handle the appeal of the Petitioner from the Supreme Court of Virginia to the Supreme Court of the United States.

Subsequently, notice of appeal was filed by the Petitioner on May 15, 1989 with the Supreme Court of Virginia and the Clerk of the United States Supreme Court.

A Jurisdictional Statement was filed by Petitioner on May 22, 1989 and counsel for

the Petitioner, who made an appearance at that time, was informed that counsel would have to be qualified and admitted before the United States Supreme Court within twenty-one days and that a Petition for Writ of Certiorari would have to be filed within twenty-one days upon the proper size paper pursuant to the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the U. S. Constitution.

Fourteenth Amendment to the U. S. Constitution.

STATEMENT OF THE CASE

The evidence of the Commonwealth was that Sarah Hobbs, a housewife in the City of Suffolk, was shot and killed in her home on October 8, 1984. Witnesses in the residential community had observed the Petitioner, a

salesman from Mehalko Exterminating Company, in the area shortly before the shooting. He claimed to have had car trouble to one witness and was seen by other witnesses walking down the street and driving around in the area.

The testimony rendered in the suppression hearing of February 22, 1985, indicates that the Petitioner was picked up at his home in Smithfield, Virginia, by Detective J. D. Bangley and other officers of the Suffolk Police Department on October 8, 1984, between 3:00 p.m. and 6:00 p.m. and taken to the police station in Suffolk, Virginia. The Petitioner was taken to an interrogation room and was never informed that he could leave said room until after he had given a confession and signed a consent to search form at 11:00 p.m. on October 8, 1984 (Tr. 6, 96, 113).

The Petitioner testified that he was advised of his constitutional rights and that he signed a waiver of those rights and gave a

statement explaining why he was in the area where the crime was committed which was written by Detective Bangley and later typed and submitted at the suppression hearing as Defendant's exhibit 1 (Tr. 9-10).

At the conclusion of giving the statement, the officers indicated that they wanted the Petitioner to consent to a paraffin test to determine if he had fired a weapon. The Petitioner stated that they accused him of murder at this stage and when they did he affirmatively asserted that he wanted an attorney. The Petitioner's request for an attorney is corroborated by the fact that it was typed on the written statement as his response at the end of the statement (Tr. 10, 101-103).

The Petitioner stated that when he requested the attorney, the officers left the room. That they came back and questioned him further and again he asserted his request for an attorney. He stated that the officers took

samples from his skin for the paraffin test over his objection and that each time the officers resumed the interrogation of him he would request an attorney. He stated that each time he requested an attorney the officer left the room and would remain out of the room for a few minutes and then come back and start talking to him again. He stated that he requested an attorney about nine times. At one point, he was given a telephone book to select an attorney from but he did not recognize the names of any attorneys. He further testified that there was no telephone in the room nor was he allowed to leave the room (Tr. 12-15, 92-93, 108).

Detective Bangley admitted that the Petitioner requested an attorney two or three times and that each time he requested an attorney the officers left the room. He admitted that they did not honor his request for an attorney nor did they attempt to make any determination whether he had funds to

employ counsel. In fact, the Petitioner was indigent and did not have counsel until the General District Court for the City of Suffolk appointed an attorney for him on October 9, 1984. Detective Bangley did not deny that the Petitioner's requests for an attorney were ignored (Tr. 131).

ARGUMENT

Petitioner contends that the trial court should have suppressed the statement taken from him during police interrogation as being in violation of his constitutional rights under the Fifth and Fourteenth Amendments to have counsel present during interrogation.

The case of Miranda v. Arizona, 384 U.S. 436, 473-74 (1966), established the rule that if the accused indicates he wishes to consult with an attorney, that he cannot be questioned further and any statements are not admissible.

The Miranda decision of 1966 was

reinforced by the United States Supreme Court decision of Robert Edwards v. State of Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S. Ct. 1880, decided May 18, 1981. In Edwards, the defendant, after being advised of his rights and given a statement, stated that he wanted to consult with an attorney before making any deal. The police officer provided the defendant with the telephone number of a county attorney and the defendant called the attorney. However, after hanging up, the defendant again stated that he wanted to have an attorney before making a deal. Thereafter, the defendant was further advised of his rights and gave a statement. The United States Supreme Court held that the statement was inadmissible where the defendant had invoked his right to have counsel present and counsel was not present when the statement was obtained.

At the suppression hearing, the Commonwealth cited the case of Oregon v.

Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830 (1983). This case held that once the defendant invokes his right to counsel, the admissibility of a later confession and response to police interrogation depends on whether the accused initiated the further communication. The real test there is whether the defendant actually initiated the conversation. In that case, all interrogation had ended and the defendant was being prccessed when he initiated conversation with the law enforcement officer. In the case now before the court, the interrogation continued and was initiated by Detective Bangley after each request for counsel and each absence of Detective Bangley and cannot, by any stretch of the imagination, be construed to be a waiver by the Petitioner and an initiation of communication with the officer by the Petitioner in view of his repeated requests for counsel.

In addition to the authorities cited by the Petitioner and the Commonwealth at the suppression hearing, on appeal, the Petitioner now cites the case of Smith v. Illinois, 469 U.S. 91, 83 L.Ed.2d 488, 105 S.Ct. 490, decided on December 10, 1984, which held that the Defendant's responses to continued police questioning should have ceased after the Defendant requested counsel.

In conclusion, there can be no question but that the Petitioner, when he realized that he was being accused of the crime to the point of samples of his skin moisture being taken over his objection, repeatedly requested assistance of counsel and that the police disregarded his requests but continued to question him and talk to him about the alleged offense until he finally gave a confession. That under the Miranda, Edwards, and Smith decisions of the United States Supreme Court, said confession is clearly inadmissible. It is just as clear that the

statement of the Petitioner was not the result of later initiated conversation by the Petitioner with the law enforcement officers whereby he intelligently and knowingly waived his requests for counsel. The in-custody interrogation and conversation with the Petitioner by the law enforcement officers never ceased in this case. The officers leaving the room for five minutes each time the Petitioner requested an attorney and then returning again to talk with the Petitioner about the offense was a continuing interrogation and effectively deprived the Petitioner of his right to counsel. The giving of the telephone directory to an indigent defendant does not meet the burden on the Commonwealth as stated by Miranda to demonstrate that the defendant knowingly and intelligently waived that right. To the contrary, the Petitioner persisted in requesting the presence of counsel for hours, on nine occasions, by his testimony and three

occasions by the detective's testimony.

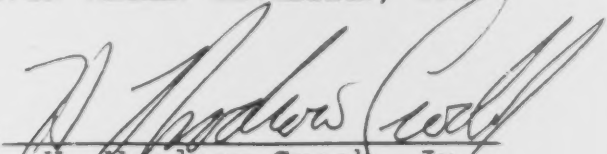
To comply with the law of the country as repeatedly enunciated by the United States Supreme Court, the statement of the Petitioner in this case has to be suppressed as having been elicited from the Petitioner following his repeated requests for counsel. The convictions of the Petitioner should be reversed and the case remanded to the trial court with direction to suppress the said statements.

CONCLUSION

For the foregoing reasons, Petitioner Liverman respectfully requests this Court to grant his Petition for Certiorari.

Respectfully submitted,

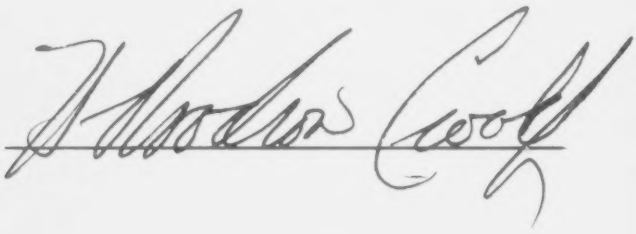
MELVIN ALLEN LIVERMAN, JR.

By: 

H. Woodrow Crook, Jr.
Post Office Box 406
Route 2, Box 186-A
Smithfield, Virginia
23430
(804) 357-3050

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Petition for Writ of Certiorari was mailed, postage prepaid, to Honorable Mary Sue Terry, Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219, this 1st day of June, 1989.



APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK

COMMONWEALTH

V. STATUTORY BURGLARY
MURDER
USE OF A FIREARM

MELVIN ALLEN LIVERMAN, JR.

It appearing to the Court that on the 22nd day of February, 1985, the attorney for the defendant moved the Court to suppress as evidence, all statements taken from him by Detective J. D. Bangley of the Suffolk Police Department on the 8th day of October, 1984;

And the Court having at such time taken the aforesaid motion under advisement, the Court doth now find that Melvin A. Liverman, Jr., knowingly and intelligently relinquished or abandoned his right to an attorney and that the defendant's confession and statements made to the detective are

admissible and the motion to suppress is denied in accordance with the opinion of the Court contained in its letter to counsel dated the 29th day of April, 1985.

Entered the 17th day of September, 1985

s/Benjamin A. Williams, Jr., JUDGE

Benjamin A. Williams, Jr.

VIRGINIA:

In the Court of Appeals of Virginia on Monday the 11th day of January, 1988.

Melvin Allen Liverman, Jr.,

Appellant,

against Record No. 0258-86-1
Circuit Court Nos. F62-85/4413, F-63-85/4414 and F64-85/4415

Commonwealth of Virginia,

Appellee.

From the Circuit Court of the City of Suffolk

Before Judges Baker, Barrow and Hodges

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the panel finds the following:

(1) The trial court did not err in denying the appellant's motion to suppress his statement which was voluntarily initiated by appellant subsequent to his request for advice of counsel. There was sufficient evidence for the judge to conclude that appellant knowingly and intelligently waived his constitutional right against self

incrimination. Bradshaw v. Commonwealth, 228 Va. 484, 323 S.E.2d 567 (1984).

(2) The trial court did not err in refusing to dismiss juror, Joseph F. Joseph, because his wife was employed at a forensic laboratory in Richmond. There was no evidence to show his wife had any knowledge of the case and the court properly concluded that the juror stood indifferent to the cause. Clozza v. Commonwealth, 228 Va. 124, 321 S.E.2d 273 (1984).

(3) The trial court did not err in refusing to advise the jury of the procedures followed when a defendant is acquitted by reason of insanity. The statutory instructions are directed to the court and not the jury. Spruill v. Commonwealth, 221 Va. 475, 271 S.E.2d 419 (1980).

(4) The trial court did not err in refusing to grant a mistrial because of statements made by the Commonwealth's Attorney during his objection to a hearsay

statement of appellant which allegedly inferred that appellant would not testify. Based on the objectional language, the court did not abuse its discretion by denying the motion.

(5) The trial court did not err in refusing to grant instruction 9A. The court properly instructed the jury that the burden of proof for establishing insanity as a criminal defense is "by the greater weight of the evidence." Christian v. Commonwealth, 202 Va. 311, 117 S.E.2d 79 (1960).

(6&7) The trial court did not err in refusing to grant instructions on irresistible impulse and second degree murder. There was no evidence to support granting such instructions.

Accordingly, the petitioner for appeal is denied.

The trial court shall allow court-appointed counsel the fee set forth below and also his necessary direct

out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the trial court.

A Copy,

Teste:

David B. Beach, Clerk

By: s/Debra A. R. Clem

Deputy Clerk

Costs due the Commonwealth by appellant in Court of Appeals of Virginia:

Attorney's fee	$300.00 plus his costs and expenses
Filing fee	$25.00

Teste:

David B. Beach, Clerk

By: s/Debra A. R. Clem

Deputy Clerk

VIRGINIA:

In the Supreme Curt of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 21st day of February, 1989.

Melvin Allen Liverman, Jr.,

Appellant,

against Record No. 880127
Court of Appeals No. 0258-86-1

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of the City of Suffolk shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

A Copy,

Teste:

David B. Beach, Clerk

By: s/
Deputy Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorney's fee	$300.00 plus his costs and expenses
Filing fee	$25.00

Teste:

David B. Beach, Clerk

By: s/
Deputy Clerk

V I R G I N I A :

IN THE SUPREME COURT OF VIRGINIA

MELVIN ALLEN LIVERMAN, JR.,
Appellant

against

Record No. 880127
Court of Appeals No.
0258-86-1

COMMONWEALTH OF VIRGINIA,
Appellee

M O T I O N

Pursuant to Rule 5:41:

Comes now the appellant, Melvin Allen Liverman, Jr., by counsel, who moves the Supreme Court of Virginia as follows:

(1) That the appellant wishes to appeal the decision of the Supreme Court of Virginia to the Supreme Court of the United States;

(2) That the appellant may seek a writ of review or certiorari from the Supreme Court of the decisions of the Circuit Court of the City of Suffolk, the Court of Appeals of Virginia and the Supreme Court of Virginia concerning the violation of the constitutional rights of the appellant under

the Fifth and Fourteenth Amendments of the Constitution of the United States;

(3) That the appellant is indigent and without funds to employ counsel to assist him in the perfection of his appeal to the Supreme Court of the United States and requests the Supreme Court of Virginia to appoint able and competent counsel to assist him in perfecting said appeal;

(4) That H. Woodrow Crook, Jr., counsel appointed by the Circuit Court for the City of Suffolk to assist the appellant in perfecting his appeal to the Court of Appeals of Virginia and to the Supreme Court of Virginia is not qualified in the Supreme Court of the United States and thus is not competent to handle the appeal of the appellant from the Supreme Court of Virginia to the Supreme Court of the United States.

IN CONSIDERATION WHEREOF, the appellant, by counsel, moves the Supreme Court of Virginia to appoint competent counsel to

assist the appellant in perfecting his appeal of the decision of the Supreme Court of Virginia of February 21, 1989, to the Supreme Court of the United States.

MELVIN ALLEN LIVERMAN, JR.

By: s/H. Woodrow Crook, Jr.
Counsel

H. Woodrow Crook, Jr.
Attorney at Law
Post Office Box 406
Smithfield, Virginia 23430

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion was mailed to C. Phillips Ferguson, Commonwealth's Attorney, City of Suffolk, 441 Market Street, Suffolk, Virginia 23434, and to Mary Sue Terry, Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219, this 1st day of March, 1989.

s/H. Woodrow Crook, Jr.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 16th day of March, 1989.

Melvin Allen Liverman, Jr.,

Appellant,

against Record No. 880127
Court of Appeals No. 0258-86-1

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

On March 2, 1989 came the appellant, by counsel, and filed a motion praying that the Court appoint counsel to assist him in perfecting an appeal to the United States Supreme Court.

On consideration whereof, the motion is denied.

A Copy,

Teste:

s/David B. Beach

Clerk

V I R G I N I A :

IN THE SUPREME COURT OF VIRGINIA

MELVIN ALLEN LIVERMAN, JR.,

Appellant

against

Record No. 880127
Court of Appeals
No. 0258-86-1

COMMONWEALTH OF VIRGINIA,

Appellee

NOTICE OF APPEAL

Notice is hereby given that Melvin Allen Liverman, Jr., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order refusing the petition for appeal entered in this action on February 21, 1989.

This appeal is taken pursuant to 28 U.S.C Section 2101.

The Clerk will please prepare a transcript of the record in this case consisting of the entire record received by

the Supreme Court of Virginia from the Court of Appeals of Virginia and particularly, the transcript of the suppression hearing heard in the Circuit Court for the City of Suffolk, Virginia, on February 22, 1985.

The following questions are presented by this appeal:

1. Did the State court apply an erroneous standard for determining waiver of right to counsel by focusing on voluntariness of confession rather than on whether defendant understood his right to counsel and intelligently and knowingly relinquished it. U.S.C.A. Const. Amend. 5.

2. Where the defendant invoked his right to have counsel present during custodial interrogation, valid waiver of that right can not be established by showing only that he responded to police initiated interrogation therefore the use of his confession against him at his trial violated his rights under the Fifth and Fourteenth

Amendments to have counsel present during custodial interrogation. U.S.C.A. Const. Amend. 5,14.

3. Once an accused has expressed the desire to deal with police only through counsel, he is not to be subjected to further interrogation until counsel has been made available to him. U.S.C.A. Const. Amend. 5.

Dated this 15th day of May, 1989.

s/H. Woodrow Crook, Jr.
Attorney for Appellant

H. Woodrow Crook, Jr.
Attorney at Law
Post Office Box 406
Route 2, Box 186-A
Smithfield, Virginia 23430
(804) 357-3050

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed, postage prepaid, to C. Phillips Ferguson, Commonwealth's Attorney for the City of Suffolk, 441 Market Street, Room 223, Post Office Box 1811, Suffolk, Virginia 23434, and

to Honorable Mary Sue Terry, Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219, this 15th day of May, 1989.

s/H. Woodrow Crook, Jr.